

HIGH DESERT MULTIPLE-USE COALITION, INC.
CALIFORNIA ASSOCIATION OF 4WD CLUBS, INC.
CALIFORNIA OFF-ROAD VEHICLE ASSOCIATION, INC.

IBLA 90-57

Decided September 5, 1990

Appeal from a decision of the Desert District Manager, Bureau of Land Management, implementing the Final Management Plan for the Afton Canyon Natural Area and the Surrounding Area. CA-060-8000.

Affirmed in part, set aside and remanded in part.

1. Appeals: Generally--Rules of Practice: Appeals: Generally

Associations of users of the California Desert Conservation Area who have participated in decisionmaking have standing to appeal a decision establishing motor vehicle travel routes in and around the Afton Canyon area of critical environmental concern.

2. Federal Land Policy and Management Act of 1976: California Desert Conservation Area--Federal Land Policy and Management Act of 1976: Land-Use Planning

The California Desert Conservation Area Plan created four multiple-use classes for planning purposes, requiring that subsequent planners use those classes by following guidelines established for each class.

3. Federal Land Policy and Management Act of 1976: California Desert Conservation Area--Federal Land Policy and Management Act of 1976: Land-Use Planning

Within an area of critical environmental concern designated by the California Desert Conservation Area Plan, Departmental planners may sanction land use without regard to multiple-use guidelines. Outside the area of critical environmental concern, planners must abide by established multiple-use guidelines.

4. Federal Land Policy and Management Act of 1976: California Desert Conservation Area--Federal Land Policy and Management Act of 1976: Land-Use Planning

A decision to close travel routes in an area designated "Multiple-Use Class L" by the California Desert

Conservation Area Plan that failed to apply multiple-use guidelines in designating routes is set aside and remanded to permit application of the required class "L" guidelines.

5. Federal Land Policy and Management Act of 1976: California Desert Conservation Area--Federal Land Policy and Management Act of 1976: Land-Use Planning

Planning decisions made when the California Desert Conservation Area Plan was approved in 1980 are not subject to review on appeal of the 1989 Afton Canyon Management Plan.

APPEARANCES: Mary L. Grimsley, Ridgecrest, California, Secretary for High Desert Multiple-Use Coalition, Inc.; Steve M. Kuehl, Huntington Beach, California, Vice President for California Off-Road Vehicle Association, Inc.; Patrice Davison, Riverside, California, Field Representative for California Association of 4WD Clubs, Inc.; Lynn M. Cox, Esq., and Clementine Berger, Esq., Office of the Solicitor, U.S. Department of the Interior, Pacific Southwest Region, Sacramento, California.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

High Desert Multiple-Use Coalition, Inc. (High Desert), California Association of 4WD Clubs, Inc., and California Off-Road Vehicle Association, Inc. (CORVA) have appealed a June 8, 1989, decision by the Desert District Manager, Bureau of Land Management (BLM) to implement a Final Management Plan for the Afton Canyon Natural Area and the Surrounding Area (Afton Plan). The 1989 Afton Plan would close 75 miles of existing routes used by motor vehicles in the vicinity of the Afton Canyon Area of Critical Environmental Concern (ACEC), leaving about 30 miles of such ways open to motor vehicle travel. In part, the justification for route closure rests on a finding in the Afton Plan that motor vehicle "use disturbs mobile wildlife such as bighorn sheep" (Afton Plan at 35). Appellants are separate clubs of motor vehicle users whose members use existing routes of travel in Afton Canyon in pursuit of recreation in the area.

[1] Acting pursuant to section 601 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781 (1982), the Secretary of the Interior, on December 18, 1980, approved the California Desert Conservation Area Plan (CDCA) and environmental impact statement (EIS). The CDCA established the Afton Canyon ACEC, located on 4,904 acres of land in the Mojave Desert between Barstow and Baker, California. Appellants have all participated in prior planning involving the CDCA, the ACEC, and the Afton Plan. Members of appellant associations regularly use the ACEC and adjoining desert lands. We therefore find that appellants have standing to appeal approval of the Afton Plan. Dorothy A. Towne, 115 IBLA 31 (1990); The Wilderness Society, 110 IBLA 67 (1989); Mark S. Altman, 93 IBLA 265 (1986); In Re Pacific Molybdenum Co., 68 IBLA 325 (1982). 1/ BLM has

1/ Citing cases that involve standing to seek judicial review, BLM has challenged appellants' standing to seek administrative review by this

requested expedited consideration of this appeal, alleging that the matter concerns actions which, to be effective, must be taken before winter, and that a decision is therefore required before the season of heavy use commences in December. Appellants do not oppose this request. Similar requests have been granted in the past. See The Wilderness Society, supra; Dorothy A. Towne, supra. Accordingly, this appeal is advanced on the docket and considered out-of-turn.

[2] During the pendency of this appeal, the parties agreed to narrow the issues before the Board for review, appellants having consented to implementation of all or part of proposed management actions numbered 6 through 20 of the Afton Plan. 2/ Still before us for review are appellants' challenges to actions numbered 1 and 2 and parts of actions 5 and 6. Management action 1 proposes future amendment of the CDCA "to expand the Afton Canyon ACEC" by adding 3,840 acres to the ACEC (Afton Plan at 10). Action 2 is related to action 1 and seeks to "[c]onsolidate land ownership patterns in the planning area by acquiring private lands with important resource values." Id. Management action 5 authorizes BLM to designate certain numbered travel routes open to vehicle use and to close all other vehicle routes and washes. Id. at 12. Management Action 6 "[p]rovides for passage of motor vehicles along the historic Mohave Road by rerouting a portion out of the riparian area and designating the Mohave Road through Afton Canyon as open for use by all vehicles on a single, signed route, only." Id. at 15. Appellants also challenge "the reroute of [route] AF326 between the upper trestle and one-half mile east of the middle trestle," contemplated by Management Actions 5 and 6 (Plan at 12-15).

The CDCA is BLM's response to the mandate of FLPMA section 601. The Afton Plan is tiered to the CDCA. 3/ The CDCA provides direction for management actions using four multiple-use classes, with guidelines established for each of the classes. Independent of the multiple-use designation, direction is also provided by "certain site-specific decisions such

fn. 1 (continued)

Board. We, however, have rejected the notion that judicial determinations of standing control questions of administrative standing. Colorado Open Space Council, 109 IBLA 274 (1989); In re Pacific Coast Molybdenum, supra. See Koniag v. Andrus, 580 F.2d 601, 615 (D.C. Cir. 1978), for the proposition that standing before the agency should rest on an inquiry whether allowing standing to a party will assist the agency in fulfillment of its functions. Participation by appellants and their members in prior and present planning for Afton Canyon satisfies this administrative standard perfectly.

2/ While appellants' agreements with BLM do not concede that no challenges are made with respect to management actions 3, 4, and 17, appellants' arguments before us do not address those actions directly, and they challenge management action 2 only insofar as concerns the reason given by BLM for expansion of the ACEC. (Concerning review of ACEC determinations generally, see 43 CFR Part 2400.)

3/ "Tiering" refers to a practice that allows and encourages use by later planners of prior planning documents. 40 CFR 1502.20 provides, pertinently, that:

as Areas of Critical Environmental Concern." Id. at 6. Most of the area around Afton Canyon has been put into class "L," for "limited use." This category protects sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated class "L" are managed to provide for generally lower-intensity, carefully controlled multiple-use of resources, while ensuring that sensitive values are not significantly diminished. Id. at 13.

"Areas of critical environmental concern" are defined by section 103 of FLPMA, 43 U.S.C. § 1702(a) (1982), to mean "areas within the public lands where special management attention is required * * to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural system or processes, or to protect life and safety from natural hazards." The Afton Canyon ACEC was established to protect vegetation, wildlife habitat, outstanding scenic quality, and riparian area (CDCA at 124). To amend or designate a new ACEC requires that the CDCA be amended, following procedures established by the CDCA itself (CDCA at 143-46).

Designation as an ACEC distinguishes an area from areas that are managed for multiple use. An ACEC is a distinct category for planning purposes, and establishment of an ACEC means that protection of certain resources are recognized to be of special importance, justifying special usage (CDCA at 124, 125). Multiple use classes are not followed in such areas, which are instead managed to protect the identified "critical environmental concern" (CDCA at 124).

[3] Appellants and BLM agree that the 4,904-acre ACEC established by the CDCA in Afton Canyon may not be altered in area or extent by the Afton Plan. Amendment of the ACEC to enlarge or substitute other land for areas now in the ACEC must therefore follow CDCA procedures. Within the Afton Canyon ACEC, for example, BLM may take action reasonably calculated to vigorously protect the wildlife habitat of bighorn sheep (CDCA, Table 15, Map. No. 3). Actions on land adjacent to, but outside the Afton Canyon

fn. 3 (continued)

"Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussion from the broader statement by reference and shall concentrate on the issues specific to the subsequent action."

The CDCA provides, at page 12, that:

"Environmental analysis is required for any action to implement this [CDCA]. The analysis will supplement and not repeat the environmental analysis already accomplished as part of the Plan development process. If the impact is not significant, the analysis will be documented as an environmental assessment and a 'Finding of No Significant Impact' issued. If the impact is significant, it will be documented as an environmental impact statement."

ACEC, however, remain subject to guidelines imposed by the multiple-use class "L" designation. Pages 52 through 61 of the Afton Plan comprise the vehicle route designation record of decision used to formulate route closures in the Afton Plan. Afton Plan Appendix D. 4/ The record of decision does not distinguish between routes inside the Afton Canyon ACEC and routes located in multiple-use class "L." Appellants contend the failure to do so was contrary to provision of the CDCA and requires reconsideration by BLM of the routes designated closed by the plan.

Appendix D of the Afton Plan shows that BLM applied general standards for designation of public land for off-road vehicle use established by 43 CFR 8342.1 when closing roads in Afton Canyon. 5/ This was done despite the fact that some parts of the routes were in multiple-use class "L" and required the planner to consider five "route designation factors" (CDCA at 91). These factors require that a determination be made whether the route is new or existing; whether it provides access for resource use or enjoyment; whether there are alternative access opportunities; whether it causes considerable adverse impacts; and whether there are alternative access routes which do not cause considerable adverse impacts. Id.

The Afton Plan record of decision establishes that those factors were not applied to any route designation decision there announced. The route designations made by management actions 5 and 6 are therefore set aside and remanded to permit BLM to apply the class "L" guidelines required by the CDCA to be used determine route designations, to the extent those routes lie outside the Afton Canyon ACEC. To the extent affected routes are inside the ACEC, however, the purposes for which the ACEC was created control route designation.

[4] Concerning route designation within the Afton Canyon ACEC, appellants assert that BLM's closure of routes on the south canyon rim to protect bighorn sheep water access lacks foundation. To support their argument that there is no evidence bighorn sheep are adversely affected by motor vehicle travel routes, they have supplemented the record on appeal with an environmental impact study entitled Studies of Desert Bighorn Sheep (Ovis Canadensis Mexicana) in Western Arizona (Smith 1987). Replying to appellants' contentions with an appeal to common sense, BLM admits that motor vehicle traffic in Afton Canyon is light, but reasons that vehicular use does not have to be heavy to scare sheep away from water. See Answer at 48-51.

Although the Afton Plan refers to a study monitoring sheep by the State of California, the results of that study have not been furnished

4/ Appellants argue that BLM was required to conform the record of decision to 40 CFR 1505.2 dealing with a "[r]ecord of decision in cases requiring environmental impact statements." This argument, which assumes that an EIS must be prepared, is not reached because of the result reached by this decision.

5/ 43 CFR 8342.1 provides, generally, that "[t]he authorized officer shall designate all public lands as either open, limited, or closed to off-road vehicles."

by BLM. 6/ The 1987 Arizona study is, therefore, the only solid evidence before us concerning the response of bighorn sheep to human activity. That study, considering the effects of such activity, including motor vehicle traffic, on sheep behavior studied by electronic monitor from November 1977 through January 1984, concludes

the closer the disturbance to an individual or group, the farther the animal(s) moves from the disturbance. Also larger groups tended to move farther than small groups or individuals. There was a large amount of variability in response to disturbance relative to the distance between the sheep and the disturbance. Some animals moved 1000 m[eters] away when the sheep noticed it. Other animals did not move when the disturbance was very close and the majority of flights away from the disturbance were on the order of 100 m[eters] only.

Id. at 12. The 1987 Arizona study was principally concerned with the effect of constructing an electrical transmission line within sheep habi-tat. The study considered the need of sheep for access to water and observed a correlation between proximity of sheep to a given disturbance and their reaction. By supplying this study appellants have refuted BLM's position that there were no studies of bighorn sheep behavior useful to determining action reasonably to be taken in the instant case. While the 1987 Arizona study does not demonstrate that motor vehicle traffic has no effect on sheep behavior, it does bring into question the conclusion by the Afton route planners that existing motor traffic routes would prevent sheep from going to water. Moreover, it points out that common sense judgments about sheep behavior may be quite wrong, and that sheep may, contrary to such expectations, be attracted by human activity.

The 1987 Arizona study also indicates that pedestrian traffic may be the most offensive type of human intrusion into sheep territory. Appellants emphasize two sentences in the 1987 study: "Passing cars or highway noise rarely disturbed animals (12 of 13 recorded occurrences resulted in slight

6/ There is provided to us, however, a recommendation made by the State for closure of the Afton routes, although the recommendation is not supported by reference to data collected by electronic observation of sheep behavior. The State's recommendation, in part, assumes that:

"Desert bighorn are most sensitive to human intrusion in their sum-mer concentration areas and on lambing grounds. These sensitive areas are often contiguous. Bighorn will not tolerate interference at their water source, a focal point in the summer concentration area. This is particularly true during the hot, dry period. Bighorn are even less tolerant of human intrusion on lambing areas, which are used during the winter and spring months. Abandonment of good habitat may result from harassment at the waterhole, or from repeated intrusion on the lambing grounds. The consequence of reduced habitat utilization is a serious loss of herd productivity. Compatible levels of recreational use can be established by appropriate land use plans which may exclude vehicular access in sensitive locations. The ruggedness of good sheep habitat will usually restrict human use."

or no reaction). Most of these encounters involved sheep on high ridges above roads, highways, or jeep trails" (Arizona Study at 8). Although this observation cannot be elevated into a general conclusion, as appellants would do, it does expose a fallacy in the contrary conclusion by BLM that any momentary disturbance by motor vehicles would force sheep from their customary watering places. On remand, BLM should consult the 1987 study when designating ACEC routes, and use data from the California sheep monitoring, if available, to determine what effects motor vehicle travel may have on the Afton Canyon bighorn sheep.

[5] Appellants have posed numerous arguments about the proposed route changes which BLM should consider on remand when applying the appropriate class "L" guidelines or ACEC standards. 7/ An argument that has no merit, regardless where a route under review may be located, is the assertion that BLM was required to show a history of past violations of regulations by vehicle users before any route closure could take place. This argument challenges prior planning decisions made by the CDCA when it designated ACEC's and multiple use areas. This prior planning limits BLM's authority to open routes in sensitive areas and provides standards to be used when deciding whether a route should be open or closed in other locations. Those prior designations by the CDCA may not be changed by inefficient enforcement action. BLM is bound to adopt a plan for the Afton Canyon Area that implements prior guidance provided by the CDCA. 8/

7/ We note that, as appellants point out, when planning for Afton Canyon, BLM equated a "no-action" alternative to an interim management plan. A "no-action" alternative accepts the status quo and takes no action. The record does not, however, explain the extent to which the interim plan was implemented. To the extent that the interim plan was not implemented and therefore did not represent the status quo, BLM may have erred in identifying the interim plan as the "no-action alternative." On remand, BLM should clarify this matter.

8/ Because remand of management actions 5 and 6 is required, we do not address many issues sought to be ventilated by appellants. For example, appellants express concern about possible loss of vehicle access to Afton Canyon as a result of proposed rerouting along the railroad right-of-way, either as a result of right-of-way revocation by Southern Pacific Railroad or from other causes (COVRA Statement of Reasons (SOR) at 2). Elimination of the railroad right-of-way is not included among BLM's actions proposed to implement the Afton Plan. The elimination of the right-of-way because of possible future natural or legal causes is speculative at best, and therefore not subject to review. Similarly, in another argument which must fail, High Desert has criticized BLM's closure of the sand hill or "suicide hill" for safety reasons and because it traverses the CalMat min-ing operation (High Desert SOR at 2). It appears that the owner of the mine has asked that BLM not route public land users onto his mining operation. Neither BLM nor members of the public have the right to use private property without the owner's consent, unless it is shown that there is some right of public access to the property.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's implementation of the Final Management Plan for the Afton Canyon Natural Area and the Surrounding Area is affirmed, except that management actions 5 and 6 designating certain routes closed are set aside and remanded for action consistent with this opinion.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge